IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 65 of 1991

For Approval and Signature:

Hon'ble MR.JUSTICE R.BALIA.

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

NIMESH J DESAI

Versus

PRESIDENT

Appearance:

MR AD DESAI for Petitioner

MR SUNIL C PATEL for Respondent No. 1

SERVED for Respondent No. 2

CORAM : MR.JUSTICE R.BALIA.

Date of decision: 10/12/97

ORAL JUDGEMENT

1. Heard learned counsel for the parties. The petitioner has challenged the order dated 12-10-1989 signed by Chief Officer of Valsad Municipal Council and Chairman, Dispensary Committee of Valsad Municipal Council discharging from service with effect from 14-10-1989, inter alia, on the ground that he has

remained willfully absent from the duty without leave and is causing intentionally obstacles in the administration of the hospital and additionally earlier also the committed act of insubordination towards of the officers, of Valsad Municipal Council, Chairman and other members of the Executive Committee. This order was approved by the resolution dated 31-1-1990 by Board in its general meeting held on 31-1-1990.

2. The petitioner's case is that he being a doctor holding degree of M.B.B.S. from South Gujarat University was appointed on the post of Houseman in the hospital run by the Valsad Nagarpalika vide the appointment order dated 15-9-1983 in pay scale of Rs. 700-1300. In 1985 the post of Houseman was converted into the post of Medical Officer Class-II with non-practising allowance and on 21-6-1985 the Corporation issued an order to that effect. The petitioner has alleged that he had some difference of opinion with the Chief Medical Officer of the Hospital as a result he held malice towards him. Ultimately, the impugned order dated 12-10-1989 was purported to be made in malicious exercise of power by the Chief Medical Officer. However, it was later on approved by the resolution dated 31-1-1990 as stated above.

3. In the first instance, the petitioner has urged that the impugned order is mala fide as the same is the result of malice held by the Chief Medical Officer. However, this contention of the petitioner cannot be upheld. The petitioner has levelled the allegation of malice against the Chief Medical Officer of the Corporation in paragraph after paragraph of the petition. However, he has not made the Chief Medical Officer as a party in the petition. It is well settled that the charges of malice are personal charges against the person against whom such allegations are made and they cannot be entertained unless such person is made a party in person. So, he has opportunity to defend himself against those charges in his personal capacity. In the present case, the petitioner has not at all impleaded the Chief Medical Officer much less in his personal capacity as a party respondent. In absence of the concerned person against whom such accusation of malice has been made the plea of malice against the person cannot be entertained.

4. To support his contention, learned counsel for the petitioner has relied upon the decision in the case of B. Prabhakar Rao and others etc. Vs. State of Andhra Pradesh and others etc., reported in 1986 SUPREME COURT 210, which in my opinion has no relevance to the

present controversy. It was not a case of malice against any person leading to adverse order against the petitioner. It is settled law that the person against whom mala fides or bias was imputed should be impleaded eo nomine as a party respondent to the proceedings and given an opportunity to meet those allegations. In his/her absence no enquiry into those allegations would be made. Otherwise, it itself is violative of the principles of natural justice as it amounts to condemning a person without an opportunity. Therefore, the plea of malice raised by the petitioner against the Chief Medical Officer cannot be gone into.

5. Other contentions of the learned advocate for the petitioner is that the order of discharge on the face of it is punitive and without holding any inquiry into alleged misconduct. Neither any charge-sheet was served nor any inquiry was conducted nor any finding for holding inquiry in connection with the alleged misconduct. The averments made in the affidavit in reply filed by the respondents in this regard is that the respondents have discharged the petitioner from the service by following due process of law as provided u/s 48 of the Gujarat Municipalities Act, 1963, which reads as follows:

> "No chief officer or officer appointed under subsection (4) or (5) of section 47 shall be removable from office, reduced in rank or suspended except by a resolution passed by a majority of at least two thirds of the total number of the then councillors and shall not be punishable with fine."

6. On perusal of Section 48 of the Gujarat Municipalities Act, 1963, it makes abundantly clear that it only provides the authority who is empowered to make the order of dismissal or discharge. It provides that the order of dismissal/discharge/removal or suspension can be made only in the meeting of Councillors by resolution which is required to be passed by majority of 2/3 of the total numbers of the then councillors and not otherwise. However, it does not lay down any procedure through which the officer is to be removed or reduced into rank or how the alleged misconduct of the incumbent is to b e found for which such action is taken. The law is trite that unless the rules of natural justice are excluded by expressed provision of law or necessary implication every order affecting the right of a person adversely by the authority must be made in accordance with the principles of natural justice. It is also well settled that whenever the employee is said to be removed,

discharged or dismissed from service or any other punitive action is to taken against him the order must follow by holding inquiry in accordance with the principles of natural justice i.e in case of misconduct alleged for which the employee is sought to be punished must be established after affording reasonable opportunity of hearing to the delinquent officer to defend himself against the accusation. The procedure and extent of requirements of principles of natural justice may depend upon the rules regarding holding of such inquiry. In the present case, indisputably no inquiry at all has been held nor any opportunity has been given to the petitioner and the tenure of the order shows that there is causal connection between the misconduct or misdemeanor of the petitioner with the Chief Medical Officer during the service. The order being punitive in nature and in breach of principles of natural justice and it must fail on this ground alone.

9. Question then arises for relief. Ordinarily in such circumstances the relief as to reinstatement with consequential benefits follows. However, in the present case two circumstances which have emerged are that after the order of discharge was made on 12.10.1989, before it could be final on being approved by resolution of councillors, the petitioner tendered his resignation to save his retiral benefits, which remained unconsidered. However, this shows that petitioner too was unwilling to continue with the service and was inclined to bow out with retiral benefits. Secondly, during the course of arguments learned counsel for both parties were in agreement that since then petitioner has settled in private practice, causing no financial loss to the petitioner for the period he has not discharged his duties. This is apart from the fact that shorn of allegations of notice against the then CMO, the petition itself shows that nature of alleged insubordination, if found to be true, is quite serious.

10. In the circumstances, it will be just and proper to dispose of this petition with the following directions:

(1) If the petitioner is willing to rejoin the service, he may report on duty by 15.1.1998. On his so reporting, he shall be reinstated on furnishing the undertaking that he shall not leave the service voluntarily at least for a period of four years in accordance with law and the petitioner shall be entitled to draw salary of the post with effect from the date of joining.

(2) However, in that event it will be open for the respondents to consider holding of enquiry into the alleged misconduct for which the petitioner's services are terminated, in accordance with law. In the event the respondents decide to hold an enquiry into the alleged incidence, enquiry in that connection shall be initiated within three months of the date the petitioner joins and shall be completed within four months of the initiation of enquiry.

(3) It is further directed that in case the respondents decide to hold an enquiry into the alleged misconduct the question of paying emoluments for the period during which the petitioner has remained out of employment and not discharged his duties shall be subject to the outcome of that enquiry. In case the petitioner is found guilty of the misconduct and any punishment lesser than dismissal or removal sought to be imposed, it would be open for the appropriate authority to make appropriate order for payment of emoluments during the period between the date of discharge and reinstatement.

(4) In case the petitioner opts to rejoin the services and the respondent decides not to initiate any enquiry within a period of three months or after holding enquiry, petitioner is exonerated, he shall be entitled to consequential benefits of emoluments for the period during which he was not in service, as if he had never been discharged from service, and shall also be entitled to continuity of service.

(5) If the petitioner fails to rejoin his duty on furnishing the required undertaking by 15.1.1998, it shall be deemed that petitioner is not willing to rejoin the service and he shall be further deemed to have opted for consideration of his resignation letter dated 16.8.1989. In that event petitioner shall be deemed to have been voluntarily retired with effect from 31.1.1990 as if his letter of resignation has been accepted and shall be paid all retiral benefits as are due to person seeking voluntary retirement by 31.3.1998.

11. With aforesaid directions, this petition is

allowed and the impugned order dated 12-10-89 as adopted by the resolution of the Board dated 31-1-90 is quashed and set aside.

Rule is made absolute. In the circumstances, there shall be no order as to costs.

snd